IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 380

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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In our main brief, we stated that Nora Brainard "had been and was an incompetent for upwards of 15 years and during that time was known to and by the officials and citizens of the Town of Somers as a person without mental capacity to handle her affairs and to understand the meaning of any notices served upon her", and that such facts are undisputed (Appellant's Brief, pp. 3, 4). The Appellee does not now take issue with this, but it does state:—"Actually, she was not officially adjudged incompetent until January 30, 1953, four months after the entry of judgment of foreclosure and three months after the delivery of the deed. The Appellant was subsequently appointed and qualified as Committee of Nora Brainard February 13, 1953." (Appellee's Brief, p. 3). This statement is incorrect. Nora Brainard was adjudicated a person of unsound mind on October 29, 1952, five

days after the delivery of the deed (R. 8). Appellant was appointed her Committee on January 30, 1953 and he qualified as such on February 13, 1953 (R. 7).

Strangely enough, the Attorney General in his brief on behalf of the State of New York as amicus curiae, attempts to create an issue of fact where none exists. On page 17 of his brief, he states that at the time the foreclosure judgment was entered, Nora Brainard had not been declared an incompetent and there is no evidence in the record to support a finding that at that time she was an incompetent. Apparently to support such argument, the Attorney General in his statement of the case omits reference to the salutary portion of the record left undisputed by Appellee, but mentions merely the affidavit of Appellant's attorney. He then terms the statement of incompetency as being solely an "opinion" (Brief of Amicus Curiae, p. 18). The portion of the record (R. 8) of which the Attorney General has failed to take cognizance reads:

> "Upon information and belief, the said Nora Brainard was incompetent, although not adjudicated for many years past and was known to the citizens of the Town of Somers, in which she resided, and to the officials of the Town as a person without mental capacity to handle her affairs and unable to understand the meaning of any notices served personally upon her by mail or by publication."

In the consideration of this case by the Courts below, these facts were tendered and accepted without dispute. Factually, there can be no issue as to Nora Brainard's incompetency and its knowledge by Appel-

lee. Even in the dissenting opinion of the Appellate Division, it was stated:

> "It appears without dispute that the taxpayer was incompetent for many years to the knowledge of the Town officials. Within a few days after the Town took a deed to her property for non-payment of taxes, the taxpayer was adjudicated incompetent and a Committee of her person and property appointed." (R. 16, 17).

The foregoing is set forth so as to put at rest the proffered inference of a possible issue of fact with respect to the incompetency and Appellee's knowledge thereof. Nora Brainard is and was incompetent for 15 years and the officials of the Town of Somers were fully cognizant of it.

* * * *

The legislature has the sole power to establish the methods for levy and collection of taxes. It is one thing to assess, levy and to impress a lien for taxes on property, but it is a wholly different thing to deprive a person of a right of property for failure to pay taxes. The exercise of the taxing power is a severe exercise of the power of absolute sovereignty on behalf of the State. To divest ownership without notice and without compensation for the surplus or excess value is an instance where constitutional government approaches most nearly to an unrestrained tyranny. Redemption is the last chance of a citizen to recover his property. Cooley on Taxation (4th Ed.) Secs. 1562, 1567, 1568.

The protection of the right of redemption is as old as the law itself, being found in the Hebraic,

Roman and Civil Law. *Leviticus XXV*, Lines 23-35; *1 Jones on Mortgages* (8th Ed.) Sec. 8; *4 Pomeroy's Equity Juris* (5th Ed.) Secs. 1799 et seq. Involved in it is a right to surplus funds and when such a right is to be cut off by foreclosure, proper notice is a person's due, and notice which is notice in form but a gesture in fact, is not due process. The notice, purported to have been given to the incompetent, notified her of nothing. It was no notice. She, an incompetent, did not have the same protection of the law with respect to notice equal to that of others. Had proper notice been afforded her, her property rights would have been protected. Accordingly, she was not only deprived of her property by reason of a lack of due process, but also by reason of the lack of equal protection of the laws.

An incompetent person also is incapable of acting to protect his rights from the rapacity of those instituting suits. At common law, the rights of persons non compos mentis were peculiarly under the protection of the King who, from the nature of the organization of the English government, was bound, as parens patriae, to protect their rights as helpless subjects within his Kingly realm. From the multiplicity of his social, political and military duties, not being able to give personal protection to the individual rights of his several insane and helpless subjects, the King delegated that authority to his Chancellor by his Sign Manual—that is, by written power and authority signed by the King in person, and delivered under his privy seal to the Chancellor. The rights of insane persons were at common law to be protected by the Chancellor as the personal representative

of the King, the source of sovereignty and not by the Court of Chancery.

Pomeroy Equity Juris. (3rd Ed.) Sec. 1311

But in this country, the prerogative power of the King is vested in the people of the State, who are represented by the Attorney General. Although, we have expressly stated that the constitutionality of the taxing statute is not involved, we find the Attorney General in the anomalous position of allying himself with Appellee against his ward whom Appellee knew as incompetent and incapable of protecting herself. He seeks to justify his tenuous position by the claim that perhaps she was not incompetent and consequently, even if she were a known incompetent, she deserves to be deprived of her property because her Committee, the Appellant, should have instituted a separate "action" instead of proceeding in this original foreclosure suit by motion for the same relief. Appellee joins the Attorney General in advancing such contention.

Here, too, their position is untenable. They claim that the "Courts of New York have determined that a remedy existed, to wit: an action to set aside the deed and that the procedure adopted by Appellant was improper." (Brief of Amicus Curiae, p. 15, Appellee's Brief, pp. 4, 5). It is then gratuitously stated that Appellant does not dispute this. Both Appellee and the Attorney General are in error.

The provision, contained in Subd. 7 of Sec. 165h of the Tax Law affording a remedy by separate plenary action similar in all respects to a motion in the action, is not exclusive. There is nothing in the

statute to make it so, and there is no prohibition of the motion such as we have presented.

The opinion and decision of the County Court in this case appeared on December 3, 1953. On February 1, 1954, the Appellate Division in *Nelson, et al. v. City of New York*, 283 App. Div. 722, directly disapproved of and rejected the separate or plenary action suggestion. It relegated the taxpayers to a motion in the foreclosure action to open their default and to take such proceedings therein so as to enforce whatever rights and remedies they may have. This was precisely what had been done previously by the Appellant in the case at bar.

It was that same Appellate Court which, on April 12, 1954 passed on the appeal from the County Court in the case at bar. Neither the prevailing or dissenting opinion made mention of the separate action suggestion. It is reasonable to assume that that Court found it unnecessary to do, in view of its memorandum decision in *Nelson, et al. v. City of New York* (*Supra*), published but two and a half months previously.

Parenthetically, the taxpayers in the *Nelson* case then moved in the foreclosure proceeding to open their default, etc. That motion was denied in the lower Courts and affirmed by the New York Court of Appeals in 309 N. Y. 94.

Appellee seeks to distinguish the situation in the *Nelson* case by stating that that case was decided under the Administrative Code of the City of New York and that when the first decision was rendered, the Administrative Code lacked the statutory provisions similar to Subd. 7. Suffice it to say, when the subsequent proceedings were taken, the Administrative

Code was amended to conform in its entirety to the State Tax Law under consideration so as to contain the provisions similar to Subd. 7.

Further illustrating the fallacy and error in the statement and contention that "The Courts of New York have determined" that the separate or plenary action is the exclusive remedy of Appellant are: *Matter of Wolford* (not officially reported) 130 N. Y. S. 2nd 250, (4/30/54), where a motion was made, entertained and granted in the original foreclosure action under the State tax statute; and *City of New York* v. *Stolpensky,* 134 N. Y. L. J. 10, Col. 2 (10/18/55), where similarly a motion was made, entertained and granted in the original foreclosure suit brought under the Administrative Code which contained a provision similar to that of Subd. 7.

Thus, contrary to the statement of the Attorney General and Appellee, we find that the Courts of New York have not decided and are not relegating taxpayers to a separate or plenary action. Research on our part has failed to reveal any case in any Court in New York, wherein the ruling of the County Court as to exclusiveness of remedy was followed.

A judgment rendered without appearance or service of process is a nullity. *15 Corpus Juris,* page 845. The question of jurisdiction is always open (*15 Corpus Juris,* p. 850) and may be inquired into at any time. Courts are bound to take notice of the limits of their own jurisdiction (*15 Corpus Juris,* p. 852). The rights of the incompetent were never properly before the Court for adjudication. The judgment entered herein affecting her rights is subject to direct attack by motion in the action as well as by collateral attack

as provided for in Subd. 7. *Kamp* v. *Kamp*, 59 N. Y. 212.

The Attorney General concludes his brief with the statement: "It is of legitimate concern to the State of New York that the conclusive presumption of Subd. 7 of Section 165h of the Tax Law should not be nullified, and that the validity of tax titles should not be subject to challenge on such speculative and inconclusive averments." It is undisputed that Nora Brainard was incompetent and known by the Appellee to be incompetent. This is not speculative or inconclusive. It is an uncontradicted fact. We prefer to think that it is the legitimate concern of the State of New York that its ward, Nora Brainard, a known incompetent over whom its position is that of parens patriae, should not be deprived of her property without due process and be denied the equal protection of the laws.

Respectfully submitted,

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